



DEPARTMENT OF COMMERCE

Office of the Secretary

15 CFR Part 15

[Docket No. 211210-0256]

RIN 0605-AA52

Department of Commerce Regulations on Procedures for Responding to Requests for Documents or Testimony for Use in Legal Proceedings

AGENCY: Office of the Secretary, Commerce.

ACTION: Final rule.

SUMMARY: This final rule revises the Department of Commerce’s (Commerce) regulations, known as “Touhy regulations,” that set forth the procedures for responding to requests for documents or testimony for use in legal proceedings. The revisions provide greater clarity to entities seeking documents or testimony from current or former Department employees. Specifically, these revisions clarify, update, and streamline the language of several provisions, provide greater transparency regarding the factors that the agency will consider when reviewing such requests, and more directly address issues that frequently arise in requests for documents or testimony based on the facts of the request, such as whether the testimony requested is that of a former employee, whether the United States is a party to the underlying legal proceedings, or whether the testimony or documents are requested from the Office of the Inspector General.

DATES: Effective [*insert date of publication in the FEDERAL REGISTER*].

FOR FURTHER INFORMATION CONTACT: Megan Heller, Chief, General Litigation Division, Office of the General Counsel, U.S. Department of Commerce, 1401 Constitution Ave., NW, Rm. 5896, Washington, DC 20230; telephone, (202) 482-1328.

SUPPLEMENTARY INFORMATION: This final rule revises the Department’s regulations promulgated pursuant to 5 U.S.C. 301. The regulations at 15 CFR 15.11 through 15.18 set forth

the procedures applicable to requests submitted to Commerce for the testimony of employees and the production of documents for use in legal proceedings to which the agency is not a party. These regulations are also known as “Touhy regulations,” in reference to the case in which the Supreme Court upheld the validity of such agency regulations promulgated pursuant to 5 U.S.C. 301. *See United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

These revisions to the Department’s regulations clarify the process by which demands for documents or testimony are to be made and considered. They also update and streamline the language of several provisions where past experiences suggest need for elucidation. Additionally, the Department is revising these regulations to more directly address issues that arise frequently in requests for documents or testimony. The Department intends these revisions to provide greater clarity to entities seeking documents or testimony from current or former Department employees. Following is a description of the revisions to specific provisions of the Touhy regulations.

Section 15.11—Scope.

Paragraph (a) has been revised to more clearly set forth the scope and applicability of this subpart, and to state upfront that an employee’s compliance with any demand for information or testimony requires prior authorization by the appropriate legal officers. New paragraph (c) clarifies that this subpart does not apply to proceedings in which the Department is a party. New paragraph (d) has been added to direct requests for documents or testimony from the United States Patent and Trademark Office (USPTO) to the applicable USPTO *Touhy* regulations; all references to the USPTO in the previous regulations have been deleted throughout the revised subpart B. New paragraph (e) combines previous paragraph (c) with previous § 15.17 to clarify that the Department will determine if other statutory authorities exist that address disclosure of the requested information before applying the procedures in this subpart.

Section 15.12—Definitions.

Broadly, this section has been revised to provide additional detail in definitions and add definitions for new terms used in the proposed revisions. Paragraph (a) has been revised to provide more detail in the definition of *agency counsel*. Paragraphs (c) and (i) define the Office of the Inspector General and its Counsel, reflecting the addition of new § 15.17 to address requests that are made for documents or testimony from the Office of the Inspector General. Paragraphs (b), (d) through (h), and (j) through (m) has been revised to clarify language and provide greater detail.

Section 15.13—Demand for testimony or production of documents: Department procedures.

This rule significantly revises § 15.13. The rule moves from § 15.13 to § 15.16(a) the policies and considerations that Commerce will use in determining responses to demands for documents or testimony. Paragraph (a) of revised § 15.13 restates the existing rule that no document or information may be produced without authorization from the General Counsel or appropriate agency counsel. Paragraph (b) of revised § 15.13 sets forth in more detail the notification requirements for requests submitted pursuant to this subpart; these notification requirements were formerly found at § 15.14(c). Paragraph (b)(1) has been revised to include the full address for mailed requests and an email address for submitting requests electronically. Paragraph (b)(2) refers requestors to regulations for the United States Patent and Trademark Office, for requests relating to that agency. Paragraph (c) directs employees to forward any demand to the appropriate office within the General Counsel's Office; this direction and contact information is currently set forth in § 15.14(a) of the regulations. Paragraph (d) specifically addresses the course of action that the Department will take if it determines its employee should not comply with a subpoena. In addition, this paragraph specifies that electronic service of subpoenas is not authorized.

Section 15.14—Demand for testimony or production of documents in matters in which the United States is not a party.

This section has been revised to consolidate the procedures to be followed for requests relating to matters in which the United States is not a party to proceedings, which were previously interspersed in §§ 15.14, 15.15, and 15.16 of the regulations. Notably, paragraph (g)(2) of revised § 15.14 sets forth new rules and procedures for former Department employees who are asked to provide opinion or expert testimony in such proceedings; these rules and procedures had not previously been addressed. The procedures for matters in which the United States is a party are now provided separately in new § 15.15.

Section 15.15—Demand for testimony or production of documents in matters in which the United States is a party.

This section is partly new, and encompasses provisions found previously in §§ 15.16 and 15.18 on expert and opinion testimony. It sets forth the procedures for requests relating to matters in which the United States, but not the Department, is a named party. Paragraph (a) addresses requests received from entities other than the United States, in proceedings in which the United States is a party, and requires that counsel of record representing the interests of the United States or one of its other agencies and instrumentalities be informed of such demands. Paragraph (b) addresses requests received from agencies or instrumentalities of the United States other than the Department. Notably, and consistent with past practice, paragraph (b) now states that the General Counsel may require reimbursement to the Department of expenses associated with a Department employee providing consultations on behalf of the United States. Paragraph (c) separately sets forth the procedures for expert or opinion testimony for both current and former employees in matters in which the United States, but not the Department, is a named party.

Section 15.16—Demand for testimony or production of documents: Department and Policy Considerations.

This rule revises § 15.16 to set forth in greater detail the factors that, as appropriate, will be considered in deciding whether the requested disclosure of information or testimony is in the

interests of the Department. The policy factors in previous § 15.13(a) through (f) have been moved to this section and expanded to better inform non-government requesters. Paragraphs (a)(1) through (9) sets forth a list of factors to be considered. Paragraphs (b)(1) through (3) sets forth additional considerations for the General Counsel to weigh, once requirements in §§ 15.14 and 15.15 of this subpart have been satisfied. Finally, new paragraphs (c)(1) through (8) sets forth a non-exclusive list of the factors that preclude disclosure of information that may be requested.

Section 15.17— Subpoenas and demands served upon employees or former employees of the Office of the Inspector General.

This final rule adds this new section to address requests that are made for documents or testimony from the Office of the Inspector General and to clarify that this subpart applies to requests for documents or testimony from the Office of the Inspector General. This section provides the notification procedures for requests to the Inspector General.

Comments on the Proposed Rule

The proposed rule was published in the *Federal Register* on September 27, 2021 (86 FR 53251), with a request for comments to be submitted by October 27, 2021. No comments were received.

No Substantive Changes from the Proposed Rule

This final rule makes no substantive changes to the proposed rule. We note that the regulatory text of this final rule contains two minor typographical corrections in the regulatory text of the proposed rule: the deletion of an extra word, “a”, in the first sentence of 15 CFR 15.13(d)(1), and the addition of a missing semi-colon after the phrase “the intended use of the testimony” in 15 CFR 15.14(a)(6).

Classification

This final rule is published under the authority of 15 CFR part 15, subpart B (§§ 15.11 through 15.18), which sets forth the procedures applicable to requests submitted to the

Department for the testimony of employees and the production of documents for use in legal proceedings to which the Department is not a party. These regulations are also known as “Touhy regulations,” in reference to the case in which the Supreme Court upheld the validity of such agency regulations promulgated pursuant to 5 U.S.C. 301. *See United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

This final rule has been determined to be not significant for the purposes of Executive Order (E.O.) 12866. The Department has identified no duplicative, overlapping, or conflicting Federal rules.

Pursuant to 5 U.S.C. 553(d)(3), the Department of Commerce has determined that there is good cause to waive the 30-day delay in the date of effectiveness for this final action.

Specifically, there is good cause to waive the 30-day delay in the date of effectiveness, because this final rule provides clarifications that will reduce confusion for entities seeking documents or testimony from current or former Department employees, for use in legal proceedings. The Department of Commerce’s *Touhy* regulations were last revised in 1995. This final rule improves the readability of the regulations, and provides clarifications on several points that have been the subject of consideration over the past twenty-five years. It is not necessary to have a 30-day delay in effectiveness for this final rule because 1) it imposes no additional burdens on entities seeking documents or testimony from the agency, and 2) clarifies the process making such requests, thereby making it easier for entities to submit requests to the agency. As such, the Department believes that a 30-day delay in the date of effectiveness of this final rule would be contrary to the public interest. For the reasons described above, the Department finds good cause to make this rule effective immediately upon publication in the *Federal Register*.

Congressional Review Act

The changes in this final rule are not expected to result in an annual effect on the economy of \$100 million or more, a major increase in costs or prices, or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of

United States-based enterprises to compete with foreign-based enterprises in domestic and export markets. Therefore, this final rule is not expected to be considered a “major rule” as defined in 5 U.S.C. 804(2) of the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 et seq.).

Regulatory Flexibility Act

The Chief Counsel for Regulation, Department of Commerce, has certified to the Chief Counsel for Advocacy, Small Business Administration, under the provisions of the Regulatory Flexibility Act, 5 U.S.C. 605(b), that this rule will not have a significant economic impact on a substantial number of small entities. This final rule amends existing regulations in order to clarify the policies, practices, responsibilities, and procedures for Department of Commerce employees related to production of official Departmental documents and testimony by current or former employees as witnesses in legal proceedings. Specifically, the changes in this rule fall into three categories: (1) clarifying the requirements for individuals or entities making requests for Department information or testimony for use in legal proceedings; (2) refining the procedures the Department uses and elaborating on the policies that support the Department’s decision regarding whether to grant such requests; and (3) making non-substantive clarifying changes in the regulations. This rule applies to any individual or entity or their legal representative who requests information from the Department or testimony from Departmental employees for use in legal proceedings. There is no requirement that an individual or entity or their legal representative make such a request to the Department unless they seek information or testimony for use in a legal proceeding. If such a request is made, however, this final rule clarifies the current regulatory language that describes to whom in the Department the request should be sent, the standards that the request must meet, and the procedures the Department will apply to process the request and determine whether to grant it. The revisions made by this final rule are not expected to have any impact on affected entities. For example, the clarifying changes applicable to the actions of Department employees, reorganization of certain provisions, and

harmonization of terminology have no impact on affected entities seeking information or testimony from the Department for use in legal proceedings. Other changes impose no additional burden on individuals or entities seeking information or testimony from the Department for use in legal proceedings. For these reasons, this final rule will not have a significant economic impact on a substantial number of small entities.

No comments were received on this determination during the public comment period for the proposed rule. Nor has the Department received any new information that would affect its determination that this rule would not have a significant economic impact on a substantial number of small entities. As a result, a final regulatory flexibility analysis was not required and none was prepared.

Paperwork Reduction Act

This final rule contains no new collection of information subject to the Paperwork Reduction Act, 44 U.S.C. 3501 et seq.

List of Subjects in 15 CFR Part 15

Administrative practice and procedure, Courts, Government employees.

Brian D. DiGiacomo,

Assistant General Counsel for Employment, Litigation, and Information,

Office of the General Counsel.

For the reasons set out in the preamble, Commerce amends 15 CFR part 15 as follows:

PART 15 – LEGAL PROCEEDINGS

1. The authority for part 15 continues to read as follows:

Authority: 5 U.S.C. 301; 15 U.S.C. 1501, 1512, 1513, 1515 and 1518; Reorganization Plan No. 5 of 1950; 3 CFR, 1949-1953 Comp., p. 1004; 44 U.S.C. 3101; subpart C is issued under 37 U.S.C. 101, 706; 15 U.S.C. 1673; 42 U.S.C. 665.

Subpart B—Testimony by Employees and the Production of Documents in Legal Proceedings

2. Revise §§15.11 through 15.17 to read as follows:

Sec.

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15.11 Scope.

15.12 Definitions.

15.13 Demand for testimony or production of documents: Department procedures.

15.14 Demand for testimony or production of documents in matters in which the United States is not a party.

15.15 Demand for testimony or production of documents in matters in which the United States is a party.

15.16 Demand for testimony or production of documents: Department policy and considerations.

15.17 Subpoenas and demands served upon employees or former employees of the Office of the Inspector General.

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§ 15.11 Scope.

(a) This subpart sets forth the policies and procedures to be followed with respect to the production or disclosure of the testimony of employees and former employees of the Department of Commerce as witnesses in legal proceedings and the production or disclosure of information contained in Department of Commerce documents, or any information acquired by any person while such person was an employee of the Department of Commerce, for use in legal proceedings pursuant to a request, order, or subpoena (collectively referred to in this subpart as a “demand”). No Department employee or former employee shall comply with such a demand without the prior authorization of the General Counsel or appropriate agency counsel, in accordance with this subpart.

(b) This subpart does not apply to any legal proceeding in which an employee is to testify while on leave status, regarding facts or events unrelated to the official business of the Department or the duties of the employee.

(c) This subpart does not apply to any legal proceeding in which the Department is a party or to subpoenas for testimony or documents received from Congress, a Federal agency Inspector General, or a Special Prosecutor.

(d) This subpart does not apply to any demand for testimony of employees and former employees of the United States Patent and Trademark Office (USPTO) or to demands for the production of USPTO documents. The process for any demand for testimony of an employee or for the production of documents of the USPTO can be found at 37 CFR 104.21 through 104.24, and any such demands must be sent directly to the USPTO.

(e) This subpart in no way affects the rights and procedures governing public access to records pursuant to the Freedom of Information Act, the Privacy Act, or the Trade Secrets Act or other Federal law restricting the disclosure of information. Moreover, demands in legal proceedings for the production of records, or for the testimony of Department employees regarding information protected by the Privacy Act, 5 U.S.C. 552a, the Trade Secrets Act, 18 U.S.C. 1905, Census data under Title 13, U.S.C., or other confidentiality statutes, must satisfy the requirements for disclosure set forth in those statutes, if any, before the records may be provided or testimony given. The General Counsel or appropriate agency counsel should first determine if there is a legal basis to provide the testimony or records sought under applicable confidentiality statutes before applying the procedures established in this subpart.

(f) This subpart is not intended to be relied upon to, and does not, create any right or benefit, substantive or procedural, enforceable at law by any party against the United States.

§ 15.12 Definitions.

For the purpose of this subpart:

(a) *Agency counsel* means the Chief Counsel/s or General Counsel/s (or that official's designee) of a bureau or operating unit within the U.S. Department of Commerce who is the senior legal officer responsible for overseeing legal advice and guidance provided to a particular bureau or operating unit.

(b) *Component* means Office of the Secretary or a bureau or operating unit of the Department as defined in Department Organization Order 1–1.

(c) *Counsel to the Inspector General* means Counsel to the Inspector General of the U.S. Department of Commerce.

(d) *Demand* means a request, order, or subpoena for testimony or documents for use in any legal proceeding, regardless of whether the United States is a party to the proceeding.

(e) *Department* means the United States Department of Commerce and any of its components, bureaus, or operating units.

(f) *Document or information* means any record, regardless of format, medium or physical characteristic, document, electronically stored information, paper and other property of the Department, including without limitation, official letters, telegrams, memoranda, reports, studies, writings, emails, calendar and diary entries, text or chat messages, maps, graphs, pamphlets, notes, charts, tabulations, analyses, statistical or informational accumulations, any kind of summaries of meetings and conversations, film impressions, magnetic tapes or sound or mechanical reproductions. Nothing in this paragraph (f) shall be interpreted as requiring the creation of a new document to respond to any demand.

(g) *Employee* means any current or former employees or officers of the U.S. Department of Commerce, including any commissioned officer of the National Oceanic and Atmospheric Administration or any other individual who has been appointed by, or is subject to the supervision, jurisdiction, or control of the U.S. Department of Commerce, including contract employees. Contractors may be included.

(h) *General Counsel* means the General Counsel of the U.S. Department of Commerce or other U.S. Department of Commerce employee to whom the General Counsel has delegated authority to act under this subpart.

(i) *Inspector General* means the Inspector General of the U.S. Department of Commerce.

(j) *Legal proceeding* means all pretrial, trial, and post-trial stages of any existing or reasonably anticipated judicial or administrative actions, hearings, investigations, or similar proceedings before administrative, civil, or criminal courts, commissions, boards, or other tribunals, domestic—including local, tribal, state, and Federal—foreign, or international. “Legal proceedings” includes all phases of discovery as well as responses to any formal or informal requests by attorneys, investigators, or other persons not employed by the Department, regarding, testimony, documents, information, or consultation, solicited for use in any legal proceedings.

(k) *Official business* means the authorized business of the U.S. Department of Commerce.

(l) *Secretary* means the Secretary of the U.S. Department of Commerce.

(m) *Testimony* means a statement in any form, including personal appearances before a judge, magistrate, administrative law judge, administrative judge, hearing officer, special master, special counsel, investigating officer or board, or any other court or legal tribunal; declarations made pursuant to 28 U.S.C. 1746; interviews; depositions; telephonic, televised, or videotaped statements; or any responses given during discovery or similar proceedings, which response would involve more than the production of documents.

(n) *United States* means the Federal Government, its departments and agencies, and individuals acting on behalf of the Federal Government.

§ 15.13 Demand for testimony or production of documents: Department procedures.

(a) *General.* No employee, in response to a demand, shall produce any documents or information of the Department, or provide testimony regarding any information relating to, or based upon Department documents, or disclose any information or produce documents acquired

or generated as part of the performance of that employee's official duties or because of that employee's official status without the prior authorization of the General Counsel or appropriate agency counsel.

(b) *Notifications.* (1) A demand for the testimony of an employee or for the production of documents of the Department shall be made in writing and addressed to the Assistant General Counsel for Employment, Litigation, and Information, U.S. Department of Commerce, 1401 Constitution Avenue, Room 5896, NW, Washington, DC 20230; or by email to: Touhy@doc.gov; or to appropriate agency counsel.

(2) The process for any demand for testimony of an employee or for the production of documents of the USPTO can be found at 37 CFR 104.21 through 104.24, and any such demands should be sent directly to the USPTO, in accordance with § 15.11(d).

(c) *Employee procedure.* Whenever a Department employee receives an inquiry or demand for testimony or production of documents, that employee shall not respond, and shall immediately notify the Office of the Assistant General Counsel for Employment, Litigation, and Information as provided in paragraph (b)(1) of this section, or appropriate agency counsel, and provide a copy of the demand. An employee may not answer inquiries from a person not employed by the Department regarding testimony or documents subject to a demand or a potential demand under the provisions of this subpart without the approval of the General Counsel or appropriate agency counsel.

(d) *Subpoenas.* A subpoena for testimony or production of documents by a Department employee must be served in person, at the office or home, or by mail in accordance with the Federal Rules of Civil or Criminal Procedure or applicable state procedure. Service solely by electronic means is not authorized. If service is made upon anyone other than the General Counsel or appropriate agency counsel, then a copy of the subpoena shall also be contemporaneously sent to the General Counsel at the appropriate addresses in paragraph (b) of this section, or appropriate agency counsel.

(1) An employee who receives such a subpoena shall not respond and shall immediately forward the subpoena to the Office of the Assistant General Counsel for Employment, Litigation, and Information or the appropriate agency counsel. The General Counsel or appropriate agency counsel will determine the extent to which a Department employee will comply with the subpoena.

(2) If the General Counsel or appropriate agency counsel determines that an employee should not comply with a properly-served subpoena, the General Counsel or agency counsel will attempt to have the subpoena withdrawn or modified. If this cannot be done with regard to a subpoena for documents, the Department will provide the tribunal with an objections letter or other notification that the documents will not be produced. If this cannot be done with regard to a subpoena for testimony, the General Counsel or appropriate agency counsel will attempt to obtain U.S. Department of Justice representation for the employee and move to have the subpoena modified or quashed. If, because of time constraints, this is not possible prior to the compliance date specified in the subpoena, the employee should appear at the time and place set forth in the subpoena. If legal counsel cannot appear on behalf of the employee, the employee should produce a copy of the Department's regulations in this subpart and inform the legal tribunal that the employee has been advised by counsel not to provide the requested testimony and/or produce documents. If the legal tribunal rules that the demand in the subpoena must be complied with, the employee shall respectfully decline to comply with the demand. *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

§ 15.14 Demand for testimony or production of documents in matters in which the United States is not a party.

(a) *General.* Every demand for testimony or documents in a legal matter in which the United States is not a named party shall be made in writing, delivered in accordance with § 15.13(b) no later than 30 days before the document or testimony is required, and shall be

accompanied by an affidavit or written declaration under 28 U.S.C. 1746, or, if an affidavit or declaration is not feasible, a written statement setting forth:

- (1) The title of the legal proceeding,
- (2) The forum;
- (3) The requesting party's interest in the legal proceeding;
- (4) The reason for the demand and the relevance of the request to the legal proceeding;
- (5) A showing that the desired testimony or document is not reasonably available from any other source; and
- (6) If testimony is requested, the intended use of the testimony; a general summary of the desired testimony; the time that will be required to prepare for, travel to, and present testimony; and a showing that no document could be provided and used in lieu of testimony, including from opposing parties via discovery proceedings.

(b) *Purpose.* The purpose of the requirement in this section is to assist the General Counsel or appropriate agency counsel in making an informed decision regarding whether testimony or the production of a document(s) should be authorized, in accordance with § 15.16. Any authorization for testimony by an employee of the Department shall be limited to the scope of the demand as summarized in the statement or as negotiated in paragraph (c) of this section.

(c) *Prior authorization.* A certified copy of a document that has been authorized pursuant to § 15.16(a) for use in a legal proceeding may be provided upon written request and payment of applicable fees. Written requests for certification must be addressed to the agency counsel for the component having possession, custody, or control of the document. The requestor must provide the agency with information regarding the prior authorization for release of the requested document pursuant to § 15.16(a), including date of release and parties to whom the document was released.

(d) *Secretary's authority.* The Secretary retains the authority to authorize and direct testimony in those cases where a statute or Presidential order mandates a personal decision by the Secretary.

(e) *Consultation.* The General Counsel or appropriate agency counsel may consult or negotiate with an attorney for a party, or with the party if not represented by an attorney, to refine or limit a demand so that compliance is less burdensome or seek additional information about the demand necessary to make the determination required by paragraph (b) of this section. Failure of the attorney or party to cooperate in good faith to enable the General Counsel or the appropriate agency counsel to make an informed decision under this subpart may serve, where appropriate, as a basis for a determination not to comply with the demand. In addition, the General Counsel or appropriate agency counsel may impose further conditions or restrictions on the production of any document or testimony when that is in the best interests of the United States.

(f) *Fact witness.* If an employee is authorized to give testimony in a legal proceeding not involving the United States, the testimony, if otherwise proper, shall be limited to facts within the personal knowledge of the employee that are not classified, privileged, or protected from disclosure under applicable law or regulation. If asked to provide factual testimony that the employee believes may be classified, privileged, or protected from disclosure under applicable law or regulation, then the witness shall:

- (1) Respectfully decline to answer on the grounds that such testimony is prohibited; and
- (2) Request an opportunity to consult with the General Counsel or appropriate agency counsel.

(g) *Expert or opinion witness.* (1) Current employees, with or without compensation, shall not provide expert or opinion testimony in any legal proceedings regarding Department information, subjects, or activities except on behalf of the United States or a party represented by the United States Department of Justice. However, upon a showing by the requester that there

are exceptional circumstances and that the anticipated testimony will not be adverse to the interests of the Department or the United States, the General Counsel, or appropriate agency counsel after consultation with the Office of the General Counsel, may grant special authorization in writing for a current employee to appear and give the expert or opinion testimony.

(i) If, while testifying in any legal proceeding, an employee is asked for expert or opinion testimony regarding official information, subjects, or activities, which testimony has not been approved in advance in accordance with the regulations in this subpart, the witness shall:

(A) Respectfully decline to answer on the grounds that such expert or opinion testimony is forbidden by the regulations in this subpart;

(B) Request an opportunity to consult with the General Counsel or appropriate agency counsel before giving such testimony; and

(C) Explain that upon such consultation, approval for such testimony may be provided.

(ii) If the body conducting the proceeding then orders the witness to provide expert or opinion testimony regarding official information, subjects, or activities without the opportunity to consult with either the General Counsel or appropriate agency counsel, the witness shall respectfully refuse to provide such testimony. *See United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

(iii) If an employee is unaware of the regulations in this subpart and provides expert or opinion testimony regarding official information, subjects, or activities in a legal proceeding without the consultation discussed in paragraph (g)(1)(i) of this section, the witness must, as soon as possible after testifying, inform the General Counsel or appropriate agency counsel that such testimony was given and provide a written summary of the expert or opinion testimony provided.

(2) Former employees may provide opinion or expert testimony if:

(i) The testimony does not involve non-public facts, information, or documents about a particular matter that were acquired by the former employee during the performance of their employment with the United States; and

(ii) The involvement of the former employee in the proceeding as a witness complies with 18 U.S.C. 207 and applicable post-employment ethics rules. *See* 5 CFR part 2641. Former employees offering expert or opinion testimony and those seeking such testimony from former employees, must confer with the General Counsel or appropriate agency counsel to ascertain if the prospective expert or opinion testimony is consistent with this subpart.

(h) *Decision.* A decision under this subpart to comply or not to comply with a demand is neither an assertion or waiver of privilege, nor an assertion of lack of relevance or technical deficiency, nor does it reflect any other ground for noncompliance.

(i) *Waiver.* The General Counsel or appropriate agency counsel may waive any requirements set forth under this section to the extent allowed by law, when circumstances warrant.

§ 15.15 Demand for testimony or production of documents in matters in which the United States is a party.

If a demand is received pertaining to a legal matter in which the United States but not the Department is a named party, or where a party other than the Department is represented by the Department of Justice, the following rules apply.

(a) *Demand not from the United States.* For demands for documents from, or testimony of an employee of the Department, from an entity other than the United States pursuant to a legal proceeding in which the United States is a party, the demand must be in writing and signed, delivered in accordance with § 15.13(b), setting forth the information required in § 15.14(a), and copied to the attorneys of record representing or acting under the authority of the United States in the legal proceeding. Upon receipt of the demand, the General Counsel or appropriate agency

counsel shall promptly contact the appropriate Department of Justice office to coordinate any response in accordance with applicable Federal or state rules of civil procedure governing discovery matters.

(b) *Demand from the United States.* When a demand for documents from, testimony of, or consultation with an employee of the Department comes from an attorney representing or acting under the authority of the United States concerning a legal proceeding in which the United States is a party, every such demand should be accompanied by a statement setting forth the legal proceeding, the forum, the United States' interest in the legal proceeding, and the relevance and use of the requested documents or testimony. The purpose of the requirement in this paragraph (b) is to assist the General Counsel or the appropriate agency counsel in making all necessary arrangements to facilitate the demand on behalf of the United States. Where appropriate, the General Counsel or appropriate agency counsel may require reimbursement to the Department of the expenses associated with a Department employee giving testimony or providing consultation on behalf of the United States.

(c) *Expert or opinion witness.* In a legal proceeding in which the United States is a party, a current Department employee may not testify as an expert or opinion witness for any other party other than the United States. However, a former employee may provide opinion or expert testimony for a party other than the United States if:

(1) The testimony does not involve facts, information, or documents about a particular matter that were acquired by the former employee during the performance of their official duties as an employee of the United States; and

(2) The involvement of the former employee in the proceeding as a witness complies with applicable post-employment conflict of interest laws. *See* 18 U.S.C. 207 and 5 CFR part 2641. A former employee offering expert or opinion testimony or consulting, and those seeking such testimony from a former employee, shall confer with the General Counsel or appropriate agency

counsel to ascertain if the prospective expert or opinion testimony or consulting is consistent with this subpart.

§ 15.16 Demand for testimony or production of documents: Department policy and considerations.

(a) *Decision.* In deciding whether to authorize a demand for testimony or documents under this subpart, the General Counsel or appropriate agency counsel shall consider whether the disclosure or testimony is in the interests of the Department. The following factors should be considered:

- (1) Conserving the time of Department employees for conducting official business;
- (2) Minimizing the possibility of involving the Department in controversial issues that are not related to the Department's mission or matters that do not further the Department's mission;
- (3) Preventing the possibility that the public will misconstrue variances between personal opinions of Department employees and official Department policy;
- (4) Avoiding spending the time and money of the United States for private purposes;
- (5) Preserving the integrity of the administrative or judicial process;
- (6) Protecting classified, confidential, or controlled unclassified information, and the deliberative process of the Department;
- (7) Preventing the appearance of improperly favoring one litigant over another;
- (8) Avoiding the denial of a party's constitutional or statutory rights;
- (9) Whether such disclosure is appropriate under the rules of procedure governing the case or matter in which the demand arose;
- (10) Whether disclosure is appropriate under the relevant substantive law concerning privilege; and
- (11) Any other issue that is relevant to the decision.

(b) *Non-disclosure factors.* Demands for testimony or documents in response to which disclosure will not be made by any Department official include, but are not limited to, those demands with respect to which any of the following factors exist:

(1) Disclosure is restricted by statute or regulation, or would violate a rule of procedure, Executive order, policy, or an applicable Government directive;

(2) Disclosure would reveal classified or controlled unclassified information, unless appropriately declassified or decontrolled by the originating agency;

(3) Disclosure would reveal a confidential source or informant, unless the investigative agency and the source or informant have no objection;

(4) Disclosure would reveal investigatory records compiled for law enforcement purposes and would interfere with enforcement proceedings or disclose investigative techniques and procedures, the effectiveness of which would thereby be impaired;

(5) Disclosure would improperly reveal trade secrets or disclose information protected by law, a non-disclosure agreement, or court order without authorized consent;

(6) Disclosure would be unduly costly, burdensome, or otherwise inappropriate under applicable court rules;

(7) Disclosure would involve the Department in controversial issues that are not related to the Department's mission or issues that do not further the Department's mission; or

(8) Disclosure would involve scientific or expert opinion on research that is controversial or contrary to Department policy, or would result in burdensome repetition of similar testimony in subsequent proceedings.

§ 15.17 Subpoenas and demands served upon employees or former employees of the Office of the Inspector General.

Notwithstanding the requirements set forth in §§ 15.11 through 15.16, this subpart is applicable to demands served on employees or former employees of the Office of the Inspector General (OIG), except that wherever in §§ 15.11 through 15.16 there appear the phrases General Counsel,

agency counsel, or Assistant General Counsel for Employment, Litigation, and Information, there shall be substituted in lieu thereof the Inspector General or Counsel to the Inspector General. In addition, the appropriate address for notifications specified in § 15.13(b) pertaining to employees and former employees covered under this section is Office of the Inspector General, U.S. Department of Commerce, 1401 Constitution Avenue, NW, Room 7896, Washington, DC 20230.

[FR Doc. 2021-27190 Filed: 1/3/2022 8:45 am; Publication Date: 1/4/2022]